128-96

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887

No. ~~1401.~~ 990

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED APRIL 2, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 3, 1888.

1 Supreme Court of the State of Alabama. December Term, 1887.

SUPREME COURT, *Tuesday, Dec. 6th*, 1887.

Be it remembered that a regular term of the supreme court of the State of Alabama was begun and holden, according to law, at the capitol, in the city of Montgomery, on Tuesday, the sixth day of December, A. D. eighteen hundred and eighty-seven, it being the first Tuesday of said month.

Present and presiding as judges of the said court: Hon. George W. Stone, chief justice; Hon. Henderson M. Somerville, associate justice; Hon. David Clopton, associate justice.

Be it remembered that heretofore, on the 13th day of August, 1887, the following indictment was filed in open court by the clerk of the circuit court for the county of Jackson, in the State of Alabama, which is in words and figures as follows, viz:

2 *Indictment.*

Be it remembered that on this the 8th day of August, 1887, it being the second Monday in said month and the second Monday after the 4th Monday in July, 1887, and the day appointed by law for holding the circuit court of Jackson county, in the State of Alabama, in the 9th judicial circuit of said State, a term of said court was begun and held at the court-house thereof, in the town of Scottsboro'—present, the honorable John B. Tally, judge of the 9th judicial circuit of the State of Alabama, presiding; also Larkin W. Willis, clerk of said court; also William H. Dicus, sheriff of said county, and also D. W. Speake, solicitor for Jackson county, State of Alabama—when the following proceedings were had and done—that is to say, William H. Dicus, sheriff of said county — Jackson, here now returns into open court the State's writ of *venire facias* for a grand jury for the present term of this court, which is in the words and figures as follows, to wit:

THE STATE OF ALABAMA, *Jackson County:*

Circuit Court.

To the sheriff of said county, Greeting:

3 You are hereby commanded to summons the following-named persons to appear and serve as grand jurors at the next term of the circuit court of said county, to wit, on the 2nd Monday in August next, they having been regularly drawn as jurors for said term of said court, to wit:

No.	Names.	Residence.	Occupation.
1	David Tate	Precinct No. 9	Farmer.
2	D. T. Crownover	" 2	"
3	M. M. Gilbreath	" 12	"
4	W. B. Bridges	" 20	"
5	W. L. Prince	" 18	"
6	Preston Smith	" 14	"
7	R. J. Thomas	" 16	"
8	James W. Moody	" 21	"
9	J. W. Duckett	" 27	"
10	R. A. Allen	" 1	"
11	R. F. Proctor	" 13	"
12	Elisha Stogsdill	" 6	"
13	F. O. Hurt	" 14	"
14	J. J. Overdue	" 5	"
15	M. J. Kelley	" 15	"
16	Thomas Russell	" 7	"
17	J. S. A. Flanagan	" 17	"
18	Henry H. Coulson	" 28	"
19	M. P. James	" 4	"
20	Arnold Green	" 19	"

And have you then and there this writ with your endorsement thereon.

Witness the 8th day of July, 1887.

L. W. WILLIS, *Clerk.*

4 In pursuance of the — of the within writ I have executed the same by summoning, as directed in the said writ, the following-named persons, to wit, David Tate, D. T. Crownover, M. M. Gilbreath, W. B. Bridges, W. L. Prince, Preston Smith, R. J. Thomas, James W. Moody, J. W. Duckett, R. F. Proctor, Elisha Stogsdill, F. O. Hurt, J. J. Overdue, M. J. Kelly, Thomas Russell, J. S. D. Flanagan, Henry H. Coulson, M. P. James, and Arnold Green.

August 6th, 1887.

W. H. DICUS, *Sheriff.*

R. A. Allen, district No. 1, not found.

W. H. DICUS, *Sheriff.*

And thereupon the said W. H. Dicus, sheriff aforesaid, having called each of the said jurors, the following-named jurors so summoned answered in their names, to wit: David Tate, D. T. Crownover, M. M. Gilbreath, W. B. Bridges, R. J. Thomas, James W. Moody, J. W. Duckett, R. F. Proctor, Elisha Stogsdill, F. O. Hurt, J. J. Overdue, M. J. Kelly, Thomas Russell, J. S. A. Flanagan, M. P. James,

and Arnold Green, and the following-named jurors failed to answer to their names, to wit: W. L. Prince, Preston Smith, and Henry H. Coulson, all of whom, for sufficient cause shown to the court, were excused for non-attendance; and, on examination, it was shown to the court that F. O. Hurt, notwithstanding he was in attend-
5 ance upon the court, *he* was excused by the court on his showing that he was sick and not able to serve as a grand juror; and it further appearing to the court that there were present and in attendance fifteen persons qualified and competent to serve as a grand jury of inquest for said county, so that the following-named persons were, after due examination by the court touching their qualifications, *and were* each found competent and qualified to serve as grand jurors for the county of Jackson, State of Alabama, and whose names are as follows: David Tate, D. T. Crownover, M. M. Gilbreath, W. B. Bridges, R. J. Thomas, Jas. W. Moody, J. W. Duckett, R. F. Proctor, Elisha Stogsdill, J. J. Overdue, M. J. Kelly, Thomas Russell, J. S. A. Flanagan, M. P. James, and Arnold Green; and thereupon William B. Bridges was selected and appointed by the court to act as foreman of the grand jury, and who was sworn as foreman according to the law, and the said David Tate, D. T. Crownover, M. M. Gilbreath, R. J. Thomas, Jas. W. Moody, J. W. Duckett, R. F. Proctor, Elisha Stogsdill, J. S. A. Flanagan, M. P. James, and Arnold Green, being also sworn as grand jurors according to law, and all of whom were then charged by court, as required by
6 law; and thereupon George T. Dicus was duly sworn and charged as bailif- to attend upon said grand jury; thereupon said grand jury, as a body of inquest for said county, retired to their room to enter upon the discharge of their duties as such.

Indictment.

THE STATE OF ALABAMA, *Jackson County:*

Circuit Court. August Term, 1887.

The grand jury of said county charge that before the finding of this indictment that the Nashville, Chattanooga, and St. Louis railway did, on the 2nd day of August, 1887, employ James Moore as train conductor on its road within the State of Alabama and county of Jackson, the said James Moore at the time of such employment by said railway not possessing a certificate of fitness for such train conductor in so far as color-blindness and visual powers are concerned, duly issued in accordance with the requirements of the statute in such cases made and provided, against the peace and dignity of the State of Alabama.

D. W. SPEAKE,
County Solicitor.

Indictment.

THE STATE OF ALABAMA, *Jackson County:*

Circuit Court. August Term, 1887.

7 THE STATE
vs.
NASHVILLE, CHATTANOOG- AND ST. LOUIS RAILWAY. } No. 1821.

No prosecutor.
Witnesses: C. M. Porter and Paulus W. Wilson.
A true bill.

W. B. BRIDGES,
Foreman Grand Jury.

Filed in open court on the 13th day of August, 1887.
L. W. WILLIS, *Clerk.*

Capias.

THE STATE OF ALABAMA, *Jackson County:*

Circuit Court.

To any sheriff of Alabama, Greeting:

An indictment having been found against The Nashville, Chattanooga and St. Louis railway at the August term, 1887, of the circuit court of Jackson county for the offence of employing one James Moore as train conductor on its railroad without having taken out a license as to color-blindness and visual powers, you are therefore commanded forthwith to arrest the said Nashville, Chattanooga and St. Louis railway and commit it to jail unless it gives bail to answer such indictment in the sum of $200.00 at the present term of our circuit court, now being held for said county and now in session, and make return of this writ according to law.

8 Witness my hand this 13th day of August, 1887.
L. W. WILLIS, *Clerk.*

Notic-.

Executed by giving the within defendant notice, according to law, of the pendency of this indictment; and thereupon said defendant appeared in court on this day, by O. R. Hundley, attorney for said railway.
August 22nd, 1887.

W. H. DICUS, *Sheriff.*

Demurrer.

In the Circuit Court, Jackson County. August Term, 1887.

THE STATE OF ALABAMA
vs.
THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY.

The defendant demurs to the indictment in this cause because the act of the General Assembly of Alabama, approved February 28th, 1887, under which the indictment was found, is unconstitutional and void, in this:

1st. It is a regulation of commerce between the States, which is repugnant to that clause of the Constitution of the United States which vests in Congress the power to regulate such commerce, and which Congress has sought to do by the passage of the interstate commerce act, approved February 4th, 1887.

2nd. It is repugnant to the Constitution of the United States, because the act seeks to abridge the privileges or im-
9 munities of citizens of the United States.

3rd. It is repugnant to said Constitution because it seeks to deprive a person of his property without due process of law.

4th. Because said act seeks to interfere with and detain the employees of a foreign corporation passing through the State for purposes of traffic and commerce.

5th. Because it is an interference with the rights of citizens of another State while passing through the State of Alabama for the legitimate purposes of commerce and traffic.

6th. Because it compels the railroad to pay for services rendered to some one else, and is, therefore, the taking of the property of one person for the benefit of another.

7th. Because it denies the right of a foreign corporation to send a non-resident employee through the State of Alabama without having a certificate of a certain character.

8th. Because said act confers legislative authority upon the State board of health.

9th. Because said act confers judicial power upon the State board of health.

OSCAR R. HUNDLEY,
Att'y for Defendant.

Filed August 22, 1887.

L. W. WILLIS, *Clerk.*

10 *Judgment.*

THE STATE
vs.
THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY. } 1821.

AUGUST 22*nd*, 1887.

Come- the State, by solicitor, D. W. Speake, who prosecutes for the State in this behalf, and the defendant, by attorney; and the defend-

ant, having interposed a demurrer to the indictment in this cause, which said demurrer was overruled and disallowed by the court, and the defendant duly excepted and objected to said ruling of the court; and the defendant, being arraigned and on hearing the indictment read over to its attorney, Oscar R. Hundley, who, for said defendant, pleads not guilty thereto, thereupon come a jury of good and lawful men, to wit, John Snodgrass and eleven others, who were duly elected, sworn, and charged according to law — try the issue, upon their oaths do say, "We, the jury, find the defendant guilty as charged in the indictment, and assess a fine of fifty dollars against the defendant." It is therefore considered and adjudged by the court that the defendant is guilty as charged in the indictment, and that, as a punishment, the State of Alabama, for the use of Jackson county, have and recover of the defendant, the said The Nash-
11 ville, Chattanooga and St. Louis Railway, the said fine of fifty dollars, as by the jury aforesaid assessed, together with the costs in this behalf expended, for which let execution issue; and, questions of law having been reserved for the consideration of the supreme court in this case, it is ordered by the court that execution shall lay suspended in this case until said questions of law shall be determined by said court, upon the defendant's entering into bond as required by law, &c.

Bill of Exceptions.

In the Circuit Court, Jackson County. August Term, 1887.

THE STATE OF ALABAMA
vs.
THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY.

Be it remembered that on the 22nd of August, 1887, it being at a regular term of the circuit court of Jackson county, came on to be heard the case of The State of Alabama *vs.* The Nashville, Chattanooga and St. Louis Railway, when the following proceedings were had, to wit: The defendant corporation being present, by attorney, the jury duly empannelled and sworn according to law, the solicitor for the State read the indictment, which is in the words and
12 figures as follows, to wit:

THE STATE OF ALABAMA, *Jackson County:*

Circuit Court. August Term, 1871.

The grand jury of said county charges that before the finding of this indictment that the Nashville, Chattanooga and St. Louis railway did, on the 2nd day of August, 1887, employ James Moore as train conductor on its road within the State of Alabama and county of Jackson, the said James Moore at the time of such employment by said railway not *passing* a certificate of fitness for such train conductor, in so far as color-blindness and visual powers are concerned, duly issued in accordance with the requirements of the

statute in such cases made and provided, against the peace and dignity of the State of Alabama.

D. W. SPEAKE,
County Solicitor.

Indictment.

THE STATE OF ALABAMA, *Jackson County:*

Circuit Court. August Term, 1887.

THE STATE
vs.
THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY.

No prosecutor.
Witnesses: C. M. Porter, Paulus W. Wilson.
A true bill.

WM. B. BRIDGES,
Forema- Grand Jury.

13 Filed in open court on the 13th day of August, 1887.
L. W. WILLIS, *Clerk.*

To this indictment the defendant demurred; which demurrer is in the words and figures as follows, to wit:

In the Circuit Court of Jackson County. August Term, 1887.

THE STATE OF ALABAMA
vs.
THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY.

The defendant demurres to the indictment in this case because the act of the General Assembly approved February the 28th, 1887, under which the indictment was found, is unconstitutional and void, in this—

1st. It is a regulation of commerce between the States, which is repugnant to that clause of the Constitution of the United States which vests in Congress the power to regulate much commerce, and which Congress has sought to do by the passage of the interstate commerce act, approved February 4th, 1887.

2nd. It is repugnant to the Constitution of the United States because the act seeks to abridge the privilege- or immunities of citizens of the United States.

14 3rd. It is repugnant to said Constitution because it seeks to deprive a person of his property without due process of law.

4th. Because said act seeks to interfere with and detain the employees of a foreign corporation passing through the State for purposes of traffic and commerce.

5th. Because it is an interference with the rights of citizens of another State while passing through the State of Alabama for the legitimate purposes of commerce and traffic.

6th. Because it compels the railroad to pay for service rendered to some one else, and is, therefore, the taking of the property of one person for the benefit of another.

7th. Because it denies the right of a foreign corporation to send a non-resident employee through the State of Alabama without having a certificate of a certain character.

8th. Because said act confers legislative authority upon the State board of health.

9th. Because said act confers judicial power upon the State board of health.

OSCAR R. HUNDLEY,
Att'y for Defendant.

The court overruled this demurrer; to which action of the
15 court the defendant duly excepted. The defendant thereupon, in further answer to the indictment, plead "Not guilty."

The witnesses for the State, being sworn according to law, testified as follows, to wit:

That on the 2nd day of August, 1887, James Moore was employed as train conductor by the Nashville, Chattanooga and St. Louis railway, and that said Moore did on said day of August, by virtue of said employment, act in the capacity of train conductor of said railway in the county of Jackson, State of Alabama; that said Moore at the time did not possess a certificate of fitness for train conductor, in so far as color-blindness and visual powers are concerned, nor had said Moore applied for or obtained said certificate, as required by the act of the Legislature approved February 28th, 1887.

The witnesses for the defendant, being sworn according to law, testified as follows, to wit:

That the Nashville, Chattanooga and St. Louis railway employs all of its trainmen, conductors, engineers, firemen, brakemen, station agents, switchmen, flagmen, gate-tenders, and signal-men at the office of the company, in the city of Nashville, State of Tennessee; that said James Moore was employed by said Nashville, Chat-
16 tanooga and St. Louis railway at the office of the company, in the city of Nashville and State of Tennessee, on the second day of August, 1887, at a stipulated monthly salary, to act in the capacity of train conductor on a through train running between Nashville, Tennessee, and Chattanooga, Tennessee, which train *in transitu* passes through 24 miles of the State of Alabama, in Jackson county, and did so pass through on the second day of August, 1887; that said train upon which said Moore was conductor was a through train from Nashville, Tennessee, to Chattanooga, Tennessee, upon which was being transported passengers, freight, and the United States mail, shipped from Nashville and other points beyond to Chattanooga and other points beyond, and to points in the State of Georgia and other States; that said Moore is a resident and citizen of the State of Tennessee, and if he had been compelled to stop *in transitu* and be examined for color-blindness it would have caused his train to miss connection at Chattanooga with trains transporting passengers, freight, and United States mail to Georgia and other

States, and thereby greatly impeeding or delaying the transportation of passengers, freight, and United States mail between Ten-
17 nessee, Alabama, Georgia, and other States; that said Nashville, Chattanooga and St. Louis railway is a road that has 24 miles of main line in the State of Alabama, two miles in Georgia, seven in Kentucky, and 464 in Tennessee, and employs about three thousand men.

The solicitor for the State admitted, as proven according to law, that the Nashville, Chattanooga and St. Louis railway is a corporation duly chartered and incorporated under the laws of the State of Tennessee, and that there is no law or statute in the State of Tennessee and nothing in the act incorporating said railway which would require any employee of said railway to be examined for color-blindness or loss of visual power, or prohibits said railway from employing any train conductor or other trainman who do not possess a certificate of fitness therefor, in so far as color-blindness and visual powers are concerned. The defendant introduced in evidence the act of the General Assembly of Alabama approved January 21st, 1850, and especially that portion of said act which is in words and figures as follows, to wit:

"SECTION 1. Be it enacted by the senate and house of representatives of the State of Alabama in General Assembly convened, That the Nashville and Chattanooga Railroad Company be, and
18 they are hereby, authorized to construct their road through the northern portion of Jackson county, in this State, and that they shall have and enjoy all the rights, privileges, and immunities, and be subject to such restrictions as are granted to and imposed upon said company by the act incorporating the same, as far as said railroad lies in the county of Jackson."

The solicitor admitted that the Nashville — Chattanooga Railroad Company refer-ed to in the above-named act is the identical corporation which is now known as the Nashville, Chattanooga and St. Louis railway.

This being all the evidence, the defendant requested the court to charge the jury that if they believe the evidence to find for the defendant. The court refused to give this charge at the request of the defendant and give it, at the request of the solicitors, in favor of the State; to such actions of the court the defendant excepted. Verdict and judgment having been rendered against the defendant, he herewith presents this his bill of exceptions in open court and asks that the same may be signed, sealed, and made a part of the record in this case; all of which — accordingly done in open court this the
19 22nd day of August, 1887.

JOHN B. TALLEY,
Judge of Circuit.

Bond.

THE STATE OF ALABAMA, *Jackson County:*

Circuit Court.

Know all men by these presents that we, The Nashville, Chattanooga and St. Louis railway and Oscar R. Hundly, are held and firmly bound unto the State of Alabama in the sum of two hundred and fifty dollars; for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally and firmly, by these presents. Sealed with our seals and dated this the 22 day of August, 1887.

Whereas, at the August term, 1887, of the circuit court of and for said county, on, to wit, the 22nd day of August, 1887, the said State of Alabama recovered a judgment in said court against the Nashville, Chattanooga and St. Louis railway for the sum of fifty dollars fine and the costs in that behalf expended; and whereas on this day the said Nashville, Chattanooga and St. Louis railway, as
20 such defendant, has made application for an appeal from said

judgment to the next term of the supreme court, to be holden of and for said State, to reverse said judgment, and also for a supercedias of the execution of said judgment, which has been granted on entering into this bond:

Now, therefore, the condition of the foregoing obligation is such that if the said Nashville, Chattanooga and St. Louis railway shall prosecute its said appeal to effect and satisfy such judgment as the supreme court may render in this case, then the said obligation to be null and void; otherwise to remain in full force and effect.

THE NASHVILLE, CHATTANOOGA AND
ST. LOUIS RAILWAY, [SEAL]
By OSCAR R. HUNDLEY, *Att'y.*
OSCAR R. HUNDLEY. [SEAL.]

Approved August 22nd, 1887.

L. W. WILLIS, *Clerk.*

THE STATE OF ALABAMA, *Jackson County:*

I, Larkin W. Willis, clerk of the circuit court of Jackson county aforesaid, do hereby certify that the foregoing pages, from 1 to 22, inclusive, contain a full and complete transcript of the record and proceedings of the said circuit court in a cause therein pending, wherein the State of Alabana was plaintiff and The Nashville, Chattanooga and St. Louis Railway is defendant; that the said
21 Nashville, Chattanooga and St. Louis railway did, on the 22nd day of August, 1887, pray an appeal to the next term of the supreme court of Alabama, which appeal was granted upon his giving the supersedeas bond and security, and that Oscar R. Hundley, the security on said bond, is good and sufficient; all of which I hereby certify to said supreme court.

LARKIN W. WILLIS, *Clerk.*

Filed Nov. 9th, 1887.

JOHN W. A. SANFORD, *Clerk.*

Supreme Court, 8 Div. 786.

THURSDAY, *February 2nd*, 1888.

The court met pursuant to adjournment.
Present: All the justices.

* * * * * * *

Jackson Circuit Court, 8 Div.

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY
vs.
THE STATE OF ALABAMA. } 786.

Come the parties, by attorneys, and argue and submit this case for decision.

Supreme Court.

MONDAY, *February 13th*, 1888.

The court met pursuant to adjournment.
22 Present: All the justices.

* * * * * * *

Jackson Circuit Court, 8th Div.

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY
vs.
THE STATE OF ALABAMA. } 786.

Come the parties, by attorneys, and the record and matters therein assigned for errors being argued and submitted and duly examined and understood by the court, it is considered that in the record and proceedings of said circuit court there is no error. It is therefore considered that the judgment of said court be in all things affirmed. It is also considered that the appellant and Oscar R. Hundley, surety on the appeal bond, pay the costs of appeal in this court and in the circuit court.

Supreme Court, 8th Div. Dec'r Term, 1887.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY
vs.
THE STATE OF ALABAMA } No. 786.

Appeal from Jackson circuit court.

STONE, *C. J.:*

It is contended for appellant, defendant below, that the act "for the protection of the travelling public," &c., approved February 28th, 1887, sess. acts '87, is unconstitutional on two grounds: First,
23 in declaring that the examinations in reference to color-blindness, for which it makes provision, shall be "at the expense

of the railroad companies." The second ground urged is that while the statute specifies and declares certain rules for conducting examinations and granting certificates, it nevertheless provides "That the State board of health may from time to time make such alterations in or additions to these rules and requirements as they may deem just and proper."

A copy of the statute is as follows:

SECTION 1. Be it enacted by the General Assembly of Alabama, That all persons affected with color-blindness and loss of visual power, one or both, to the extent to be defined in accordance with the requirements of this act, shall be and they are hereby disqualified from serving on railroad lines within this State in the capacity of locomotive engineer, fireman, train conductor, brakeman, station agent, switchman, flagman, gate-tender, or signal-man, or in any other position which requires the use or discrimination of form or color signals.

SEC. 2. Be it further enacted, That any person who shall serve in any of the capacities mentioned in section one of this act without first having obtained a certificate of fitness for his position, in accordance with the provisions of this act, shall be guilty of a misdemeanor, and, on conviction thereof before any court or competent jurisdiction, shall be fined not less than ten nor more than fifty dollars for each and every offense.

SEC. 3. Be it further enacted, That on and after the first day of June, 1887, examinations and re-examinations, at the expense of the railroad companies, shall be required under this law, and any railroad company, officer, or agent of the same employing, after said date, a person in any of the capacities specified in section one of this act who does not possess a certificate of fitness therefor, in so far as color-blindness and visual powers are concerned, duly issued in accordance with the requirements of this act, shall be guilty of a misdemeanor, and for each and every offense shall be punished by a fine of not less than fifty nor more than five hundred dollars: Provided, That those persons already in employment in said capacities on the first day of June, 1887, shall be allowed until the first day of August, 1887, in which to procure the necessary certificates.

SEC. 4. Be it further enacted, That it shall be the duty of the State board of health to supervise the administration of this law, to prescribe the methods in which such examinations shall be made, the forms of certificates to be issued, of records to be kept, and of reports to be made by the examiners, and such other rules and regulations as shall from time to time by said board be deemed necessary. It shall further be the duty of the Governor to appoint as examiners a suitable number of properly qualified medical men for carrying this law into effect, and to so distribute them through the State as to best subserve the convenience of all parties concerned, and it shall be the duty of the Governor to appoint with as little delay as possible the persons so recommended: Provided, That the appointment of any of these examiners may at any time,

upon good and sufficient reasons being assigned by the State board of health, be revoked by the Governor.

SEC. 5. Be it further enacted, That any one of the examiners is hereby authorized to make the examination and issue the certificates required by this act, and for each and every such examination he shall be entitled to a fee of three dollars, but in the event that a certificate of fitness for the specified duty is refused the person so refused may demand a second examination by the same examiner before an appeal board, to be composed of three phy-cians, to be appointed by the president of the State board of health, the fee of three dollars for this examination to be divided among the members of the appeal board, and the decision of this board to be final.

26 SEC. 6. Be it further enacted, That the following rules shall govern the actions of the examiners: Provided, That the State board of health may from time to time make such alterations in or additions to these rules and requirements as they may deem just and proper:

Rule 1. All railroad employees requiring examination under this act shall be divided into two classes: Class first shall include engineers, firemen, and brakemen; class second shall include train conductors, station agents, switchmen, flagmen, gate-tenders, signalmen, and all others whose duties require them to use or distinguish form or color signals.

Rule 2. Certificates shall be given for each class in accordance with the following directions for examinations. Promotion from one class to the other requires re-examination and certificate.

Rule 3. Re-examinations shall be made once every five years, and also under the following conditions, viz: After any serious disease of the eyes; after all injuries affecting the head or eyes; after any disease of the brain; after every long-continued illness, as typhoid fever; after mistakes or acts which call in question the visual powers, either of form or color; and whenever a majority of the board may deem it necessary and so direct.

27 Rule 4. The following shall be the requirements for the certificates in the first class: (1) Healthy eyes and eyelids, without habitual congestion or inflammation; (2) unobstructed field of vision; (3) normal visual acuteness and refraction; (4) freedom from color-blindness; (5) absence of cataract.

Rule 5. The second class shall have (1) healthy eyes and eyelids, without habitual congestion or inflammation; (2) unobstructed visual field; (3) visual acuteness at least equal to three-fifths without eyeglasses and normal with glasses; (4) freedom from color-blindness in one eye and color perception at least equal to three-fourths in the other eye.

Rule 6. After an employee has held his position for five years or more the standard required in each class may be determined by special action of the examining board.

SEC. 7. Be it further enacted, This act shall be in force from and after June 1st, 1887.

We do not consider the decision of either of these questions necessary in this case. The first will arise, and properly arise, when the railroad corporation is sought to be held accountable for
28 the fee. Its refusal to pay does not relieve the physician accepting appointment as examiner of the duty of examining and certifying as to the qualifications of applicants who come properly before him (Baldwin *v.* Kouns, 81 Ala., 272); nor can the second of the questions arise until the State board of health attempts to make alterations in or additions to the rules for examination of applicants for license. It is not pretended that they have yet attempted to do so.

If either or both of these provisions should be declared invalid, or even unconstitutional, such ruling will not impair the unity of the statute or work its destruction. It can still be executed in the spirit in which it was framed. 3 Brick. Dig., 127; 8, §§ 18, 23, 25, 26, 27.

An argument has been made before us based on the word employ ("employing") as used in the statute. The contract under which the services of the conductor were obtained in this case was made in the State of Tennessee, the State in which the corporation has its domicil and principal office. The argument is that the Legislature of this State cannot prescribe rules for making contracts in another State. The conclusion is just if the premises justify it; but they do not. The provision has no reference to the mere contract
29 under which the services were obtained. It relates to and regulates the services procured to be performed for the corporation. Its meaning in this statute is to make use of, to intrust with some agency or duty, making use of, intrusting with some agency or duty.—Worcester's Dictionary. There is nothing in this argument.

The remaining questions argued in this case have been considered and settled adversely to appellant, both by this court and by the Supreme Court of the United States. McDonald *v.* State, 81 Ala., 279; Smith *v.* State (recently), U. S.

We have no wish to reopen the discussion.

The judgment of the circuit court is affirmed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Alabama, Greeting:

Because in the record and proceedings as also in the rendition
30 of the judgment of a plea which is in the said court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Nashville, Chattanooga and St. Louis Railway, appellant, and The State of Alabama, appellee, wherein was drawn in question the validity of a certain act of the General Assembly of the State of Alabama, approved February 28th, 1887, entitled An act for the protection of the travelling public against accidents caused by color-blindness and defective vision, and it being alleged that said act of the General Assembly of Alabama is in violation of the Constitution of

the United States, and the said supreme court of Alabama has decided that said act is not in violation of the Constitution of the United States, and thereby great damage and injury have been done to the said Nashville, Chattanooga and St. Louis railway by the said decision of the supreme court of the State of Alabama, and a manifest error —, to the great damage of the said railway, as by its complaint appears, we, being willing that error, if any hath been committed, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
31 concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause justice to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme court, the 23rd day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Alabama.

Writ of error allowed February 23, 1888.

GEO. W. STONE,
Chief Justice Supreme Court Alabama.

Filed Feb. 23, 1888.

JOHN W. A. SANFORD, *Clerk.*

32 THE UNITED STATES OF AMERICA, *ss:*

To the State of Alabama, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein The Nashville, Chattanooga and St. Louis Railway is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Stone, chief justice of the supreme court of the State of Alabama, this 23rd day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

GEO. W. STONE,
C. J. Sup. C't Ala.

I, Thomas Seay, as Governor of the State of Alabama, do
33 hereby accept service of the within notice of appeal taken by the Nashvill-, Chattanooga and St. Louis Railway in the case

of The Nashville, Chattanooga and St. Louis Railway *vs.* The State of Alabama to the Supreme Court of the United States, and waive any other or further notice of said appeal or writ of error.

February 24th, 1888.

THOS. SEAY,
Governor of Alabama.

Filed Feb. 24th, 1888.

JOHN W. A. SANFORD, *Clerk.*

34 Know all men by these presents that we, The Nashville, Chattanooga and St. Louis Railway and Oscar R. Hundley, are held and firmly bound unto the State of Alabama in the full and just sum of five hundred dollars, to be paid to the said State of Alabama, — certain attorney, successor, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately at a regular term of supreme court of the State of Alabama, in a suit depending in said court, between The Nashville, Chattanooga and St. Louis Railway, appellant, and The State of Alabama, appellee, judgment was rendered against the said Nashville, Chattanooga and St. Louis railway affirming the judgment of the circuit court of Jackson county, and the said Nashville, Chattanooga and St. Louis railway having obtained an appeal or writ of error and filed a copy thereof in the clerk's office of the said court to revise the judgment of the supreme court of Alabama in the aforesaid suit, and a citation, directed to the said The State of Alabama, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the

35 second Monday of October next:

Now, the condition of the above obligation is such that if the said Nashville, Chattanooga and St. Louis railway shall prosecute its appeal or writ of error — effect an- answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

NASHVILLE, CHATTANOOGA &
ST. LOUIS RAILWAY, [SEAL.]
By OSCAR R. HUNDLEY, *Att'y.* [SEAL.]
OSCAR R. HUNDLEY. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—
GEO. W. STONE, *C. J. Sup. C't Ala.*

Filed Feb. 23, 1888.

JOHN W. A. SANFORD, *Clerk.*

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Nashville, Chattanooga and St. Louis railway, appellant, and the State of Alabama, appellee, wherein was drawn in question the validity of a certain act of the General Assembly of the State of Alabama, approved February 28th, 1887, entitled An act for the protection of the travelling public against accidents caused by color-blindness and defective vision, and it being alleged that
37 said act of the General Assembly of Alabama is in violation of the Constitution of the United States, and the said supreme court of Alabama has decided that said act is not in violation of the Constitution of the United States, and thereby great damage and injury have been done to the said Nashville, Chattanooga and St. Louis railway by the said decision of the supreme court of the State of Alabama, and a manifest error —, to the great damage of the said railway, as by its complaint appears, we, being willing that error, if any hath been committed, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then,
38 under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in said Supreme Court then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause justice to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the 23d day of February, in the year of our
39 Lord, one thousand eight hundred and eighty-eight.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Alabama.

Writ of error allowed February 23, 1888.

GEO. W. STONE,
Chief Justice Supreme Court Alabama.

[Endorsed:] Filed Feb. 23, 1888. Sanford, clerk. No. 1.

40 THE UNITED STATES OF AMERICA, *ss:*

To the State of Alabama, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein the Nashville, Chattanooga and St. Louis railway is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Stone, chief justice of the supreme court of the State of Alabama, this 23d day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

GEO. W. STONE,
C. J. Sup. C't Alabama.

On this — day of ——, in the year of our Lord one thousand eight hundred and eighty- —, personally appeared —— ——, before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to ——.

—— ——.

Sworn to and subscribed the — ——, A. D. 188–.

—— ——.

41 I, Thomas Seay, as Governor of the State of Alabama, do hereby accept service of the within notice of appeal taken by the Nashville, Chattanooga and St. Louis railway in the case of the Nashville, Chattanooga and St. Louis Railway *vs.* The State of Alabama to the Supreme Court of the United States, and waive any other or further notice of said appeal or writ of error.

February 24th, 1888.

THOS. SEAY,
Governor of Alabama.

[Endorsed:] Filed Feb. 24, 1888. Sanford, clerk. No. 3.

42 THE STATE OF ALABAMA, *Montgomery County:*

I, John W. A. Sanford, clerk of the supreme court of the State of Alabama, hereby certify that the foregoing pages, numbered from 1 to 35, inclusive, contain a full, true, and correct copy of the record and proceedings of the said supreme court in a case lately pending therein, in which the Nashville, Chattanooga and St. Louis railway was appellant and the State of Alabama was defendant, and a copy of the appeal bond, the writ of error, and citation of appeal, and that the writ of error and citation of appeal hereunto attached were the writ of error and citation of appeal filed in the office of the clerk of the supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, at the capitol, in the city of Montgomery and State of Alabama, on the fifth day of March, A. D. eighteen hundred and eighty-eight.

[Seal of the Supreme Court of Alabama.]

JOHN W. A. SANFORD,
Clerk of the Supreme Court of the State of Alabama.

43 *Assignment of Errors.*

In the Supreme Court of Alabama. December Term, 1887.

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY
vs.
THE STATE OF ALABAMA.

Now comes the appellant and says that there is manifest error in the record and proceedings in the court below, in this—

1st. The court erred in overruling defendant's demurrer.

2. The court erred in refusing to give the charge asked by the defendant and giving the same at the request of the State.

3. The court erred in overruling defendant's demurrer and in refusing to give the charge to the jury asked for by defendant,
44 and in so doing failed and refused to give full force and effect to the following provisions of the Constitution of the United States, viz., art. 1, sec. 8, subdivision 3, which provides that Congress shall have power to regulate commerce among the States; article 5 of the amendments to the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law.

Wherefore said appellant prays that said judgment be reversed, annulled, and altogether held for naught.

OSCAR R. HUNDLEY,
Att'y for Appellant.

Endorsed on cover: Alabama supreme court. No. 1401. The Nashville, Chattanooga & St. Louis Railway, plaintiff in error, *vs.* The State of Alabama. Filed April 2, 1888.

Office Supreme Court U. S.
FILED.
SEP 27 1888
JAMES. H. McKENNEY,
CLERK.

Sep 27

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 1401.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, PLAINTIFF IN ERROR,

—vs—

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF FOR PLAINTIFF IN ERROR.

OSCAR R. HUNDLEY,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 1401.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
PLAINTIFF IN ERROR,

—VS.—

THE STATE OF ALABAMA.

ASSIGNMENT OF ERRORS.

Now comes the Plaintiff in Error, in the above entitled cause, and says that in the record and proceedings in the Supreme Court of the State of Alabama, there hath intervened to the injury of the Plaintiff in Error, manifest error, and assigns as such the following:

That said Supreme Court of Alabama affirmed the judgment of the Circuit Court of Jackson county, of said State, and in so doing held and decided that the Act of the General Assembly of Alabama, referred to and set forth in the opinion of said Supreme Court, is a valid and constitutional law, and not in violation of, or repugnant to the following provisions of the Constitution of the United States, to-wit:

1st. Article I, Section 8, sub-division 3, which provides "that Congress shall have power to regulate commerce among the several States."

2nd. Article III, Section 2, sub-division 3, which provides

"that the trial of all crimes shall be held in the State where the said crimes shall have been committed."

3rd. The 5th amendment to the Constitution of the United States which provides "that no person shall be deprived of life, liberty or property without due process of law."

And Plaintiff in Error prays that the judgment of the Supreme Court of Alabama may be reversed, and Plaintiff in Error discharged.

It is agreed that the assignment of errors as above set forth, shall be considered by the Court as the assignment of errors required by Section 997 of the Revised Statutes.

It is further agreed, that it shall be considered by the Court, that the Defendant in Error has formally joined issue on said assignment and denied the errors set forth.

OSCAR R. HUNDLEY, Attorney for Plaintiff in Error.

T. N. McCLELLAN Att'y-Gen'l. for Defendant in Error.

STATEMENT OF FACTS.

This is a writ of error brought by the Nashville, Chattanooga and St. Louis Railway, to review the judgment of the Supreme Court of Alabama, rendered on an appeal from the Circuit Court of Jackson county, Alabama. On the 13th day August, 1888, an indictment was filed in the Circuit Court of Jackson county, against the Nashville, Chattanooga and St. Louis Railway, a corporation, charging it with the alleged crime of having employed as train conductor upon its road one James Moore, who at the time of said employment did not possess a certificate of fitness for such train conductor in so far as color-blindness and visual powers are concerned, as required by the Act of the General Assembly of Alabama, approved February 28th, 1887, entitled "An Act for the protection of the traveling public against accidents caused by color-blindness and defective vision."

Upon the trial of the cause in the Circuit Court of Jackson county, Alabama, the defendant demurred to the indictment, alleging as grounds for said demurrer, that the Act of the General Assembly of Alabama, approved February 28th, 1887, under which the indictment was found, was repugnant to the

Constitution of the United States. Upon the Court overruling the demurrer, the following facts were then proven, the defendant having plead "not guilty." That the Nashville, Chattanooga and St. Louis Railway did on the 2nd day of August, 1887, at its office in the city of Nashville, State of Tennessee, employ James Moore, a resident and citizen of the State of Tennessee, at a stipulated monthly salary, to act in the capacity of train conductor, on a through train running between Nashville, Tennessee and Chattanooga, Tennessee, which train *in transitu*, passes through 24 miles of the State of Alabama, in Jackson county, and did so pass through on the 2nd day of August, 1887, with said Moore as conductor. That said Moore did not at the time possess a certificate of fitness for train conductor in so far as color-blindness and visual powers are concerned, nor had said Moore applied for or obtained said certificate as required by the Act of the General Assembly of the State of Alabama, approved February 28th, 1887. That said Nashville, Chattanooga and St. Louis Railway is a corporation, duly chartered and incorporated by the State of Tennessee, and granted right of way through the State of Alabama, by act of the General Assembly thereof approved January 21st, 1850, with the privilege "to have and enjoy all the rights, privileges and immunities, and be subject to such restrictions as are granted to and imposed upon said company by the act incorporating the same as far as said railroad lies in the County of Jackson." That there is no law or statute in the State of Tennessee, and nothing in the act incorporating said railway, which would require any employee thereof to be examined for color-blindness or loss of visual power, or prohibits said railway from employing any train conductor, or other train men who do not possess a certificate of fitness therefor in so far as color-blindness and visual powers are concerned. That said train upon which said Moore was conductor, was a through train from Nashville, Tennessee to Chattanooga, Tennessee, upon which was being transported passengers, freight and the United States Mail shipped from Nashville and other points beyond, to Chattanooga, and other points beyond, and to points in the State of Georgia and other States. That if said Moore had been com-

pelled to stop *in transitu*, and be examined for color blindness, it would have caused his train to miss connection at Chattanooga with trains transporting freight, and the United States Mail to Georgia and other States, thereby impeding and delaying such transportation between Tennessee, Alabama, Georgia and other States. The said Nashville, Chattanooga and St. Louis Railway, owns and operates 24 miles of main line in the State of Alabama, 2 miles in Georgia, 7 in Kentucky, and 464 in Tennessee and employs about three thousand men.

This being all the evidence, the defendant asked the Court to charge the jury, that if they believe the evidence, they must find for the defendant, which the Court refused to do. The Supreme Court of Alabama affirmed the judgment of the Circuit Court of Jackson County.

ARGUMENT.

The main question presented to this Court for determination is, whether the Act of the Alabama Legislature, approved February 28th, 1887, is in harmony with the Constitution of the United States, especially in so far as it is sought to enforce its provisions against the Plaintiff in Error. The following is a copy of the Act in question (Acts of Alabama, 1886–87, pages 87–89):

AN ACT

For the protection of the travelling public against accidents caused by color-blindness and defective vision.

SECTION 1. Be it enacted by the General Assembly of Alabama, That all persons affected with color-blindness and loss of visual power, one or both, to the extent to be defined in accordance with the requirements of this Act, shall be and they are hereby disqualified from serving on railroad lines within this State in the capacity of locomotive engineer, fireman, station agent, switchman, flagman, gate-tender or signal man, or in any other position which requires the use or discrimination of form or color signals.

SEC. 2. Be it further enacted, That any person who shall serve in any of the capacities mentioned in section one (1) of this act without first having obtained a certificate of fitness for

his position, in accordance with the provisions of this Act, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction, shall be fined not less than ten nor more than fifty dollars for each and every offense.

SECTION 3. Be it further enacted, That on and after the first day of June, 1887, examinations and re-examinations, at the expense of the Railroad companies, shall be required under this law, and any Railroad company, officer or agent of the same, employing after said date, a person in any of the capacities specified in section one (1) of this Act, who does not possess a certificate of fitness therefor, in so far as color-blindness and visual powers are concernəd, duly issued in accordance with the requirements of this Act, shall be guilty of a misdemeanor, and for each and every offense shall be punished by a fine of not less than fifty nor more than five hundred dollars; Provided, that those persons already in employment in said capacities on the first day of June, 1887, shall be allowed until the first day of August, 1888, in which to procure the necessary certificates.

Sec. 4. Be it further enacted, That it shall be the duty of the State Board of Health, to supervise the administration of this law, to prescribe the methods in which such examinations shall be made, the forms of certificates to be issued, of records to be kept, and of reports to be made by the examiners, and such other rules and regulations as shall from time to time by said board be deemed necessary. It shall further be the duty of the Governor to appoint as examineıs, a suitable number of properly qualified medical men for carrying this law into effect, and to so distribute them through the State as to best subserve the convenience of all parties concerned; and it shall be the duty of the Governor to appoint with as little delay as possible the persons so recommended: Provided: That the appointment of any of these examiners may at any time upon good and sufficient reasons being assigned by the State Board of Health, be revoked by the Govenor.

SECTION 5. Be it further enacted, That any one of the examiners is hereby authorized to make the examination and issue the certificates required by this act, and for each and every such examination he shall be entitled to a fee of three dollars,

but in the event that a certificate of fitness for the special duty is refused, the person so refused may demand a second examination by the same examiner before an appeal board to be composed of three physicians, to be appointed by the President of the State board of Health, the fee, of three dollars for this examination to be divided among the members of the appeal board, and the decision of this board, to be final.

SECTION 6. Be it further enacted That the following rules shall govern the actions of the examiners: Provided, that the State board of Health may from time to time make such alterations in or additions to these rules and requirements as they may deem just and proper:

Rule 1. All railroad employees requiring examination under this act shall be divided into two classes: Class first shall include engineers, firemen and brakesmen; class second shall include train conductors, station-agents, switchmen, and all others whose duties require them to use or distinguish form or color-signats.

Rule 2. Certificates shall be given for each class in accordance with the following directions for examinations: promotion from one class to the other requires re-examination and certificate.

Rule 3. Re-examinations shall be made once every five years, and also under the following conditions viz: After any serious disease of the eyes: after all injuries affecting the head or the eyes: after any disease of the brain: after every long continued illness, as typhoid fever: after mistakes or acts which call in question the visual powers, either of form or color: and whenever the majority of the board may deem it necessary and so direct.

Rule 4. The following shall be the requiremets for the certificates in the first class: (1.) healthy eyes and eyelids without habitual conjestion or imflamation: (2.) unobstructed field of vision: (3.) normal visual acuteness and refraction: (4) freedom from color-blindness;(5) absence of cataract.

Rule 5. The second class shall have, (1) healthy eyes and eye-lids, without habitual congestion or inflammation; 2—unobstructed visual field; (3) visual acuteness, at least equal to

three fifths without eye-glasses and normal with eye-glasses; (4) freedom from color blind-ness in one eye,and color perception at least equal to three fourths in the other eye.

Rule 6 After an employee has held his position for five years or more, the standard required in each class may be determined by special action of the examining board.

Sec. 7. Be it further enacted, This act shall be in force from and after June 1st, 1887.

I.

The Act in question is repugnant to Art. 1, Sec. 8, subdivision 3, of the Constitution of the United Stases, which provides, "that Congress shall have power to regulate commerce among the several States." The Supreme Court of Alabama bases its decision of this question (Record, page 14) upon the decision of this Court, in the case of Smith vs. The State of Alabama, 124 U. S. 465. In this case this Court decided that the Act of the Alabama Legislature requiring locomotive engineers to be examined and obtain a license, is a valid law, "and properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of person and property; and that so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally and remotely, and not so as to burden or impede them." The Court in referring to the Statute says (Smith vs. Alabama 124 U. S., page 480) "No objection to the Statute, as an impediment to the free transaction of commerce among the States, can be found in any of its special provisions. It requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed *nor prescribe any arbitrary conditions* to the grant. The fee of of five dollars to be paid by an applicant for his examination is not a provision for raising revenue, but is no more than an equivalent for the service rendered, and cannot be considered in the light of a tax or burden upon transportation."

Now it will be seen that the Act of the Alabama Legisla-

ture, the constitutionality of which is assailed in the case at bar, differs in many of its provisions from the Act which requires a license of locomotive engineers, the constitutionality of which was passed upon by this Court in the case of Smith vs. the State of Alabama above referred to. Upon examination of the former Act (Acts of Alabama 1886-87, pp 87-89) we find that it prescribes many *arbitrary conditions* which are not prescribed by the Act requiring a license of locomotive engineers. 1st. It requires the examinations and re-examinations to be made at the "expense of the railroad companies. (Sec. 3, Record p. 12). 2nd. It confers arbitrary powers upon the State Board of Health by authorizing them to "prescribe the methods in which the examinations shall be made," and whatever "rules and regulations from time to time they may deem necessary." (Sec. 4, Record p. 12). Also by authorizing the State Board of Health to "make such alterations or additions to the rules and requirements from time to time as they may deem just and proper." (Sec. 6, Record p. 13). Also by authorizing a majority of the Board to require re-examinations "whenever they may deem it necessary and so direct." (sec. 6 Rule 3, Record p. 13). Also by authorizing the Board to determine by their "special action" the standard required in each class for employees who have held their positions for five years or more. (Sec. 6, Rule 6, Record p. 13).

Now we concede the rule of law as established by this Court in its recent decisions touching the police power of a State to be, that the Legislature may regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, so as to secure for the public safety of person and property, and in so doing may incidentally affect commerce among the States; but we contend, that if the statute, tends to burden or impede such commerce, or if it confers upon the State or upon its officers whose duty it is to administer the law, the power to make the statute the means by which such commerce *may be* burdened or impeded, that then the statute must be held void. The police regulation must be by its terms and conditions *reasonable* and not *arbitrary*. The line of distinction between that which constitutes an interference with commerce, and that which is a mere police regula-

tion, is sometimes exceedingly dim and shadowy, and we submit, that when the State deems it necessary for the safety of person and property within its jurisdiction, to enact a police regulation which may incidentally effect inter-state commerce,it should be compelled to select that means which will not burden or impede such commerce.

The Statute under discussion has been enacted, and the manner of its administration, and its most important provisions and conditions, we find rest within the discretion of the State Board of Health. They may change these provisions whenever they see proper to do so, without giving any notice whatever to the general public, by which those engaged in inter-state commerce may be advised. It is idle for us to say that the interests of the State and its officers would prevent an oppressive administration of the law. In referring to this precise point Mr. Justice Field in the case of Gloucester Ferry Co. vs. Pennsylvania,114 U.S. 196,on page 205,among other things said: "Those engaged in foreign and inter-state commerce are not bound to trust its (the State's) moderation in that respect; they require security, and they may rely on the power of Congress to prevent any interference by the State until the act of Commerce, the transportation of passengers and freight is completed." If the State of Alabama can prescribe such restrictions, upon persons engaged in inter-state commerce, and incidentally upon such commerce itself, then every other State in the Union can do likewise,and there would be no end of complications to be encountered by such persons while in transitu between the different States. In the case of Wabash &c. Railway Co. vs. Illinois, 118 U. S. 557, the Court said (page 572): "It is not the railroads themselves that are regulated by this Act of the Illinois Legislature, so much as the charges for transportation, and in language just cited, if each one of the States through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all other incidents of transportation to which the word "regulation" can be applied, it is readily seen that the embarrassment upon inter-state transportation, as an element of inter-state commerce, might be too oppressive to be submitted to. 'It was,' in the language of the court cited above 'to meet just

such a case that the commerce clause of the Constitution was adopted."

In the case of the W. U. Telegraph Co. vs. Pendleton, 122 U. S. 359, this Court, said: "Undoubtedly under the reserve powers of the State which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the State for the good order, peace and protection of the community. The subjects upon which the State may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation, that the State does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution."

It is shown by the evidence in this case that Moore, a citizen of the State of Tennessee, was employed by the Plaintiff in Error, as conductor on a *through train only*, passing through 24 miles of the State of Alabama, (Record p. 8.) This Court in Passenger Cases, 7 Howard, 283–578, held that "The officers and crew of a vessel are as much an instrument of commerce as the ship." From which it would seem clear, that the conductor on a train engaged in inter-state commerce, is as much an instrument of that commerce as the engine and train of cars. Now since every component part of a railroad engaged in inter-state commerce, is an instrument of commerce, and if the States can confer upon the State Board of Health, the power to prescribe the manner, andthe methods of examining the eyes of the employees, they can also confer upon some other authority the power to prescribe the requisites for the proper kind of rails, wheels, engines, and in fact everything which the safety of the public demands.

Now the Act of the Alabama Legislature, we contend, may be made the means of absolutely prohibiting inter-state commerce through Alabama, for there is no authority in the Act by which the railroad can compel these employees to be examined, or by which the State can compel them to be examined. Therefore unless the foreign corporation can find persons qualified by their *own voluntary action*, it must cease to do business in the State of Alabama. Again the methods of the examinations, forms of certificates to be issued, records to be kept, and in fact all the rules and regulations governing the

examinations, are by the Act left *entirely* within the discretion of the State Board of Health, who have it in their power to require such examinations that no person could successfully pass. (Acts of Alabama 1886-87, page 88, secs. 4 and 6.) Now suppose the State of Tennessee should enact the same law the State of Alabama has enacted, and the State Board of Health of Tennessee should see proper to prescribe different rules and regulations from those prescribed by the Alabama Board; the employees might be able to successfully pass the examination in Tennessee, but fail in Alabama, and thus the commerce between these States would be impeded, and morever it would be impossible to obtain that uniform system of commerce between the States, for which the commerce clause of the Constitution was framed.

County of Mobile vs Kimball, 102 U. S. 691; Fargo vs. Michigan, 121 U. S. 231; Gloucester Ferry Co. vs. Pennsylvaniane, 114 U. S 196; Brown vs. Houston, 114 U. S. 622; Pickard vs. Pullman Southern Car Company, 117 U. S. 34; Wabash, St. L. & Pacific Railway vs. Illinois, 118 U. S. 557; Walling vs. Michigan, 116 U. S. 446; Corson vs. Maryland, 120 U. S. 502, Case of the State Freight Tax, 15 Wall, 232; Hall vs. De Cuir, 95 U. S. 485, 497; Railroad Company vs. Husen 95 U. S. 465.

In the case of Robbins vs. Taxing District of Shelby county, 120 U. S. 489, this Court said: "In a word, it may be said that, in the matter of inter-state commerce, the United States are bnt one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject."

"Transportation of merchandise through a State or from one State to another, although the carriage may be continuous, is Inter-State Commerce, and beyond the control of the States even where Congress has taken no action upon the subject."

Railroad Commissioners vs. Railroad Co., 26 Amer. & Eng. R. R. cases, 29.

In the case of the Pensacola Telegraph Co. vs The Western Union Telegaph Co. 96 U. S. 1; the Court held that it was

not only the right, but the duty of Congress to take care that intercourse among the States is not interfered with by State legislation.

We contend further that the Act of the Alabama Legislature is repugnant to the commerce clause of the Constitution, because it is a tax upon interstate commerce, at least in so far as it applies to the Plaintiff in Error. Sec. 3, of the Act (Acts of Alabama 1886-87, page 87, Record page 12) provides that "examinations and re-examinations at the *expense of the railroad companies*, shall be required." In a word, it levies a tax upon the railroad companies, to obtain a revenue for the carrying out of the law. The railroads are required to pay the fees for the examinations, both before the original examiner, and before the "appeal board," whether the certificate is granted or not, and whether the party examined is an employee or a mere stranger. This Court said in the case of Robbins vs. Taxing District of Shelby County, 120 U. S., 489. "Interstate Commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the State." And again in the case of Leloup vs. Port of Mobile, 127 U. S., on page 648. "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce *in any form*, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congess." The Court there cites a long list of decisions holding this view, which is here referred to.

II.

The Act in question is repugnant to Article III, Section 2, sub-division 3, which provides, "that the trial of all crimes shall be held in the State where the said crimes shall have been committed;" at least in so far as it is sought to enforce its provisions against the Plaintiff in Error. The offense with which the Plaintiff in Error was charged in the Circuit Court of Jack-

son County, Alabama, is that of "*employing* James Moore as train conductor on its road," etc., (Record. page 3.) The facts show that Moore was *employed*, by the Plaintiff in Error, in the city of Nashville, State of Tennessee, and not in the State of Alabama, (Record, page 8.) Construing the Statute with the facts in this case, with that degree of strictness that the courts of the land always construe penal statutes, we are led to the conclusion, that the offense rendered penal by the Statute of Alabama, was in fact committed, if committed at all, in the State of Tennessee. Acts rendered penal by law, are penal only because the law of the place where committed makes them so.

Graham vs. Monsergh, 22 Vt. 543; Richardson vs. Burlington, 33, N. J. Law. (4 Vroom,) 190; Slack vs. Gibbs, 14 Vt. 357; Nashville etc., Railroad vs. Eaken. 6 Coldwell, 582; Crowley vs Panama Railroad, 30 Barb. 99; Leonard vs. Columbia Steam Nav. Co. 84, N. Y. 48.

All laws are co-extensive and only co-extensive with the political jurisdiction of the law-making power. McCarthy vs. Chicago and Rock Island Railroad, 18 Kansas 46, and authorities above cited.

III.

The Act in question is repugnant to the 5th amendment to the Constitution of the United States, which provides, "that no person shall be deprived of life, liberty, or property, without due process of law." The Supreme Court of Alabama has already decided (Baldwin vs. Kouns, 81st Ala., 272) that the examinations provided for under the Act, must be made by the examiner, and the certificate issued, even though the person applying for examination refuses to pay the fee. The Court bases this decision upon the special provision in the Act, which requires the fees to be paid by the railroad company.

By reference to the Act, we find (Acts of Alabama, 1886-7 pp. 87-89, Record page 12) that Section 3, provides, "That on and after the first day of June, 1887, examinations and re-examinations at the expense of the railroad companies, shall be required under this law, and any railroad company, officer or agent of the same, employing after said date a person in any of

the capacities specified in section one of this Act, who does not possess a certificate of fitness therefor, in so far as color-blindness and visual powers are concerned, duly issued in accordance with the requirements of this act, shall be guilty of a misdemeanor,etc." Section 5. provides that there may be a re-examination before "an appeal board appointed by the State Board of Health," said examination to be made "upon the demand of the person refused a certificate," the fee of three dollars, for this re-examination must be also paid by the railroad company, and the "decision of this Board to be final." This Act, as will be seen by its terms, requires the railroads to pay for the examinations of *all persons* who are required to be examined; it does not even confine these examinations to employees of the railroad. It will be noticed too that the fee is exacted for each and every *examination* (sec. 5) whether a certificate is granted or not. The railroads (who are more interested in these examinations than any one else for they have to pay for them) are not allowed a hearing in the matter. They are not allowed a hearing as to the appeal before the "appeal board," but a mere outsider may "demand a second examination," and for this second examination, as well as the first, the railroads are required to pay three dollars each. The railroads are not even given *notice* of the proceedings in any manner, but the Board of examiners are allowed to prescribe who shall be employed by them; and pass upon matters of grave importance to the railroads in their absence.

We submit that the railroads should at least be accorded a *hearing*, before being required to pay the fees, whether they are for the examination of their employees or not.

Judge Cooley in his great work on Constitutional Limitations, commends the powerful and lucid definition of the phrase "due process of law," as given by Mr. Webster in the great case of Dartmouth College vs. Woodward, 4 Wheat, 518. 581, as follows: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society." In another place during the same

argument, speaking of the powers of the legislature, and their separation from the judicial functious of the government, he said: "It (the legislature) shall not judge by *Act*; it shall not decide by *Act*; it shall not deprive by *Act*; but it shall leave all these things to be tried and adjudged by the law of the land." It cannot be denied that this payment of the fees by the railroads, is a question concerning their property about which they are entitled to be heard before being deprived of it. The Supreme Court of Alabama in the case of Zeigler vs. South and North Alabama R. R Co., 58 Ala. 599, and again in the case of Wilburn & Co. vs. McCalley, 63 Ala. 443, said: "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusivly presumed against him, this is not due process of law." Is not the requiring of the railroads to pay the fees, "conclusively presuming" a fact or liability against the railroads? Judge Cooley says, in his Constitutional Limitations, 5th Ed. Page 436: "The law of the land requires a hearing before condemnation, and judgment before dispossession."

Should it be contended that the proper construction of the act would only compel the railroads to pay for the examination of their own employees, the same arguments would hold good, for in addition to the right of the railroads to have a *hearing* upon the question of paying the fees, they certainly ought to have a *hearing* upon the question of the competency of their employees. They ought to be allowed to have notice and be present *at least* before the "Appeal Board," so as to show if they can that their employees are not affected with color-blindness.

Now if the Statute authorized the State Board of Health or the examining board to render judgment against the railroads for the examination fees, the unconstitutionality of the act would not be questioned for a moment; and yet this Statute seeks to do *indirectly* that which cannot be done directly.

The Supreme Court of Alabama says the employees are not required to pay the fees, the Board of examiners can say that we will not examine the employees unless the railroads will pay our fees, and the State of Alabama says to the railroads, if you employ any one who has not been examined and obtained a certificate, you will be committing a crime, for which you will be punished by a fine of "not less than fifty nor more than five hundred dollars." (Sec. 3, Record page 12.) "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." Westervelt vs. Gregg, 12 N. Y. 202, 209; State vs. Staten, 6 Cold. 233; McMillen vs. Anderson, 95 U.S. 37; Pearson vs. Yewdall, 95 U. S. 294; Pennoyer vs. Neff, 95 U. S. 714; Davidson vs. New Orleans 96 U. S. 97, State railroad tax cases, 92 U. S. 609.

Where an assessment is arbitrary and a hearing is denied, it is unconstitutional and void. San Mateo Co. vs. S. P. R. R. Co., 8 Sawy. 238; S. F. & N. P. Ry. Co. vs. Dinwiddie, 8 Sawy. 312. A proceeding where ones property is summarily disposed of, is *as to parties having no notice*, not due process of law. *In re* Ludwigson, 3 Woods 13; Lavin vs. Emigrant I. S. Bank, 18 Blatchf. 1.

The Supreme Court of Alabama in passing upon the question of the payment of the fees by the railroad companies, and the question of "due process of law," says that "this question will arise, and properly arise, when the railroad corporation is sought to be held accountable for the fee." (Record page 14.)

This Court will take jurisdiction of the case and decide the federal questions involved, even though it also appears that there were other defenses, if these defenses afford no legal answer to the suit. (Maguire vs. Tyler, 8 Wall. 651), and even though the case may have been disposed of generally by the court on other grounds (Minnesota vs. Bachelder, 1 Wall. 109.)

The Supreme Court of Alabama says further that the refusal of the railroad corporation to pay, "does not relieve the physician accepting appointment as examiner of the duty of examining and certifying as to the qualifications of applicants who come properly before him" (Record, page 14.) The Court seems to have overlooked the fact that there is no provision in the Statute by which

the physician can be compelled to make the examination. Suppose all the examiners refuse to make the examinations until their fees are paid by the railroad companies, how can the railroads force them to make the examinations, without tendering the fees? And yet the railroads are liable to be prosecuted criminally if they employ a person who has not been examined, or keep any one in their employ after the first day of August, 1887, who has not obtained the proper certificate

And again the Supreme Court of Alabama says, "If either or both of these provisions should be declared invalid, or even unconstitutional, such ruling will not impair the unity of the Statute or work its destruction. It can still be executed in the spirit in which it was framed" (Record, page 14.) We submit that the "spirit in which the Statute was framed," is to have the eyes of persons who work on railroads examined for color-blindness and loss of visual power, and *make the railroads pay for it.* There is no provision whatever in the Statute by which the expense of enforcing the law can be met, except by making the railroads pay it. "If the provisions of a Statute are all connected in subject matter, dependent on each other, operating together for the same purpose; or otherwise so connected in meaning that it cannot be presumed the Legislature would have passed the one without the other, the invalidity of the one part will vitiate the whole." Powell vs. the State, 69 Ala. 10. Vines vs. the State, 67 Ala. 73. Will it be contended that the Alabama Legislature would have passed the act without providing for the expense of enforcing it? Or that it would have required the physicians to make the examinations without remuneration from some source?

Under the Statute in question the examinations are to be required, *dependent upon* their being made at the expense of the railroad companies (Sec. 3, Record, page 12.)

Now, in conclusion, we submit, that even should this Court decide the Alabama Statute to be constitutional, under the special *facts* in this case, the judgment of the Supreme Court of Alabama should be reversed and the Plaintiff in Error discharged. The facts in this case show, that Moore, a citizen of Tennessee, was employed by Plaintiff in Error, *in the State of Tennessee*, to act as conductor on a through train engaged in interstate commerce, and that had he stopped in the State of Alabama en-route, to

have his eyes examined, the interstate commerce in which he was engaged would have been "*greatly impeded and delayed.*" (Record, pages 8 and 9.) The employee of Plaintiff in Error, should at least be allowed, to complete the trip on which he started in the State of Tennessee, before he should be liable to prosecution by the State of Alabama, for he is not presumed to know the law of the State of Alabama until he enters its jurisdiction. The facts show that this was the *first trip* the employee had made through Alabama, and he had received no notice of what kind of examination would be required of him. Now if the employee under the facts in this case could not be made liable for a criminal prosecution, the Plaintiff in Error could not.

All of which is respectfully submitted.

OSCAR R. HUNDLEY,
Attorney for Plaintiff in Error.

FILED.
JAMES H. McKENNEY,

Supreme Court of the United States,

OCTOBER TERM, 1888.

No. 990.]

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA, DEFENDANT.

Writ of Error to the Supreme Court of Alabama.

BRIEF FOR DEFENDANT.

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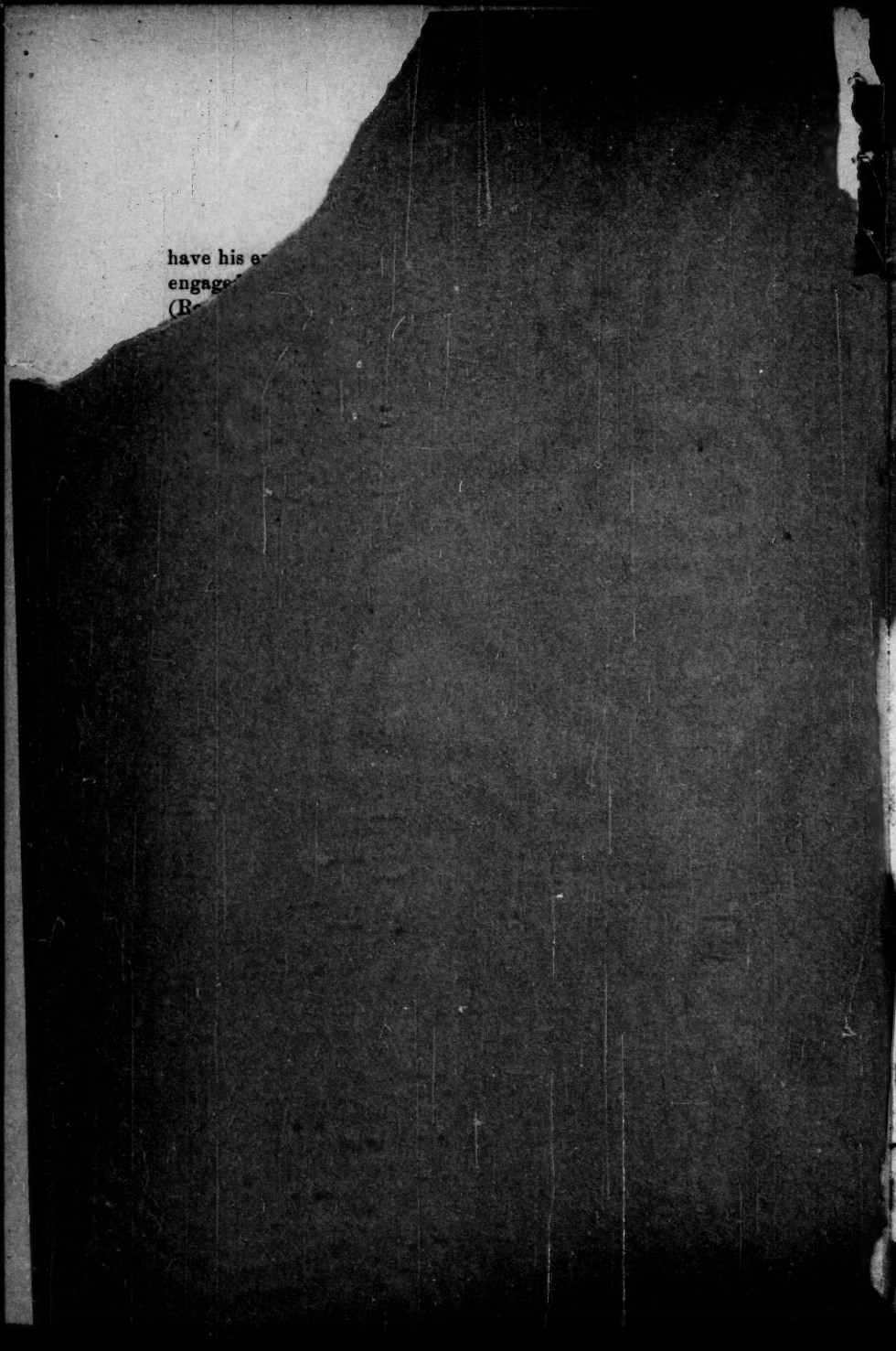
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Writ of Error to the Supreme Court of Alabama.

BRIEF FOR DEFENDANT.

Statement.

The plaintiff corporation was convicted in a Circuit Court of the defendant State of employing, in the capacity of conductor, on its road in Alabama a man who had not complied with the provisions of a statute of that State, entitled "An Act for the protection of the travelling public against accidents caused by color blindness and defective vision." This statute forbids the employment of persons affected with color-blindness and loss of visual power "in the capacity of * * * train conductor * * * * or in any other

position which requires the use or discrimination of form or color signals" on railroads within the State of Alabama, and provides for the appointment of a board of experts to examine railway employees of the classes designated with reference to their visual powers, and to certify visual competency when found to exist.

Section 3 of this act makes it a misdemeanor for any railroad company to employ a person in any of the capacities above referred to whose fitness therefor in respect of his visual powers has not been certified by an examiner. The plaintiff in error, after the act became operative, employed on its road in Alabama a man whose fitness for the position had not been certified, in the capacity of train conductor, and was regularly indicted, tried and convicted therefor. From this conviction an appeal was prosecuted to the Supreme Court of Alabama where there was an affirmance, and from the judgment of the State Supreme Court a writ of error has been prosecuted to this court, and it is here assigned that the Alabama Court erred in the following particulars:

1. In holding that the statute in question is not repugnant to the power of Congress to regulate commerce among the States.

2. In not holding said statute to be repugnant to the requirement of the Federal constitution that all crimes shall be tried in the State where committed.

3. In not holding this act to be a denial of due process of law under the 5th amendment to the Constitution of the United States.

Argument.

I.

The Supreme Court of Alabama has held in another case that it is the duty of the examiners under this act to examine all applicants and to issue licenses to those found to

be competent *without* the payment of a fee therefor by the applicant or by any railroad company.

Baldwin v. Kouns, 81 Ala. 272.

That court held in the case at bar that whether or not the act delegated legislative powers to the State Board of Health was immaterial to this case, since such powers, if delegated, had not been exercised, and had they been both delegated and exercised these facts would not defeat the statute, because without those powers the act could still be executed in the spirit in which it was framed and would be.

It was further decided that, should the requirement that the fees be paid by railroad companies be held invalid and unconstitutional the act would still be upheld and the conviction in this case sustained.

Opinion. Record, p. 14.

These are questions—relating, as they do, to the interpretation, the meaning, of a State enactment—are of final State arbitrament; and their adjudication by the Supreme Court of Alabama is binding on this court.

Cooley Const. Lim. 18 (*n*).

Elmendorf v. Taylor, 10 Wheat. 152.

Green v. Neal's Lessee, 6 Pet. 291.

Burgess v. Seligman, 107 U. S. 20.

McCutchen v. Marshall, 8 Pet. 220.

The act then, in the light of its interpretation by the Supreme Court of Alabama in this case, is to be read by this court as if it contained no requirement that the fees allowed to the examiners should be paid by railroad companies, and no delegation of legislative powers to the State Board of Health.

These views are only important in answer to the argument of plaintiff's counsel; the real question in the case, I conceive, is not touched upon by that argument.

Plaintiff admits that but for certain "arbitrary conditions" to the grant of licenses under this act, this statute would stand upon the same footing as the "Engineers Act,"

and this case would be upon all fours with the case, decided last term, of Smith v. Alabama, 127 U. S. 465.

These arbitrary conditions he insists are (1) the requirement that railroad companies should pay the fees for examinations, and (2) the delegation of arbitrary powers to the State Board of Health in that that Board is authorized (*a*) to prescribe the methods and rules and regulations for examinations (*b*), to make alterations in the same when deemed just and proper (*c*), to require re-examinations when deemed necessary and (*d*) to determine the standard required for employees who have held their positions for five years or more.

It is manifest that these alleged "arbitrary conditions" are not conditions at all—arbitrary or otherwise—to the grant of licenses under the construction put on the act by the Supreme Court of Alabama and which, for all the purposes of this writ of error, is a part of the act itself. To say that the requirement that railroads shall pay the fee for examination is a condition to the grant of a license based on that examination when the law requires that the examination be made and the license issued whether the fee is paid at all or not, is a contradiction in terms. Equally untenable is the position that the delegation of power to the State Board of Health to regulate the granting of licenses, is a condition to the grant of such licenses when no attempt by the Board to exercise that power has been made, and when its exercise, whether legally authorized or not, is wholly unnecessary to the complete execution of the statute. If the delegation to the Board of Health contained in this act is of legislative power, then it can never be exercised. If it is simply and only of power to make regulations for these examinations, such regulations could only conserve the purpose of the act as expressed by the act—the ascertainment and certification of requisite visual power in those classes of railroad operatives upon the strength and accuracy of whose vision the safety of the public depends, and could in no event impose conditions to

the grant of licenses not contemplated by the act itself. If this Board may change the substance of the statute, it takes the place of the legislature, and any subsequent amendment of the act would be as if made by the General Assembly. To hold now that the act is unconstitutional because the Board exercising the power of the legislature may at some future time incorporate unconstitutional provisions in it, would be to hold all legislation unconstitutional because all legislation is open to amendment, and future amendments may be contrary to the organic law, State or Federal. This height of absurdity has been led up to for the purpose of emphasizing the proposition that this act must be tested by what it contains, and not by what may be hereafter inserted into it by constitutional methods or otherwise—by what it is and not by what it may be Thus tested it contains no "arbitrary conditions," even from the point of view of plaintiff's counsel, to the grant of licenses and is free from every objection brought against it as being an encroachment upon the power of Congress to regulate inter-state commerce.

But I prefer to go further in this argument than appears to be necessary to meet the position of the plaintiff as to the validity of this act when brought to the touch of the commerce power of Congress. I submit that it is entirely competent for a State, not only to require the examination and certification by its officers of railroad operatives as to fitness, in those respects which involve public safety, for the positions they fill, but further that the State may require the railroad companies to pay the expenses of all acts and proceedings necessary to that end. While this point did not arise in *Smith's Case, supra,* that case necessarily and directly sustains the proposition. That case fully recognizes and sustains by authority and logic the power of the State, in the absence of legislation by Congress, to see to it that railroad operatives are competent to perform the duties of their positions, and to exercise this power in the precise mode provided for in this act, *i. e.*, by expert examinations and official certification of competency. Not only has the

force the duty of care in the selection and use of railway appliances and agencies on railroad companies, says: "If the business of railways is specially dangerous, they may be required to bear the expenses of erecting such safe guards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances."

Thorpe v. R. & B. R. R. Co., 27 Vt. 140.

Nothing in legislation is of more common occurrence or more fully sustained by the adjudged cases than the requirement, in one form or another, that natural persons engaged in dangerous avocations shall pay the expenses incident to police supervision thereof.

Tiedemon's Pol. Pard., Sec. 194.

In a recent case in New York the law of that State authorizing a State Commission to put electric wires underground at the expense of the owners was sustained.

People v. Squire, 107 N. Y. 593.

The only conclusion deducible from these cases, when the principles they decide are applied to the case at bar, is that the State of Alabama had the right to require the payment of these fees by the railroad companies, and the law would stand even if construed to make the payment a condition precedent to the grant of license.

The argument based on the contingency that railroad employees may refuse to be examined and thus put an end to the use of railroads is *considerably* farfetched. The organic laws of the country guarantee to citizens the right to pursue the learned professions, and it might as well be insisted that statutes requiring candidates for these professions to be examined and licensed would be unconstitutional because such candidates would not submit to examination. It is such arguments as this that demonstrate the poverty of the plaintiff's case.

There is unquestionably a public necessity for legislation

on this subject, which has been recognized and acted upon by most of the countries of Continental Europe, while in England and the United States, leading railways have, of their own motion, adopted systems of examination of employees for the detection of color blindness and general visual weakness; and it is equally unquestionable that the provisions of the act here involved are scientific, reasonable and proper, and impose no conditions in excess of the necessity.

Jeffries Color Blindnes; its Dangers and Detection, pp. 26–41, 43, 47, 137, 142, 150, 153–161, 176 *et seq.*, 257 *et seq.*

Juler's Ophthalmic Science, pp, 243–262.

II.

A complete answer to the second assignment and the argument made in support of it is found in the fact that this statute, as construed by the Supreme Court of Alabama, which construction is binding on this court, or if considered wholly apart from that judicial interpretation, does not contemplate or attempt to authorize the trial in Alabama of a crime committed elsewhere. The text of the act, with or without the judicial construction of it by the opinion in this case, demonstrates this proposition.

III.

The courts of Alabama have adjudged the plaintiff in error to be guilty of having employed an unqualified train conductor on its road in Alabama in violation of the provisions of a valid statute. This conviction was the result of a common law trial, in a common law court, before a common law judge, on an indictment preferred by a common law grand jury. Of this trial, the plaintiff in error had due notice, appeared before the court, pleaded to the indictment, was confronted by the witnesses against it, cross examined them and introduced its own witnesses. If these proceedings were not "in due course of law," and if the judgment in

the case was not reached by "due process of law" no judgment was ever reached or proceedings had in accordance with the 5th Amendment to the constitution of the United States.

The question of the liability of railroad companies for fees was, as has already been observed, not passed on in this case. This was not a suit for fees and no judgmant was sought or rendered against the plaintiff in error in that behalf. The Alabama court in *Baldwin v. Kouns*, *supra*, held that in no event would a railroad company be liable for fees for examinations of others than its employees. Whether a company is liable for the fees accruing for the examination of its employees, is a question that will be determined in a suit by the examiner against the company in which, of course, the company will have its day in court, and the judgment in which will have to be reached by "due process of law." While I believe the companies liable for these fees and think the authorities cited *supra* sustain that position, it does not matter, so far as plaintiff's contention under the 5th Amendment is concerned, whether they are or not.

IV.

Plaintiff's counsel advances some arguments which seem to be aimed at the case generally without regard to any particular assignment of error.

One of these seems to embody a new doctrine namely, that if there is a federal question in the record, this court will take general jurisdiction of the case, and overrule the State court not only on the national question but also on any purely State question the case may have presented in the court below. This is not the law. *Case*, *supra*, p.

Another argument is predicated on the assumption that the examiners will not perform their offices without payment of fees, that therefore employees can not be licensed and transportation will cease. The presumption is that public officers will do their duty, and if these refuse, they may be

proceeded against and compelled to discharge their functions by *mandamus*.

In his conclusion, counsel for plaintiff in error asserts the doctrine that the train conductor, for employing whom the indictment was found, is not amenable to the laws of Alabama because it was his *first trip* into the State, and—I respectfully submit the case.

T. N. McCLELLAN,
Attorney-General of Alabama.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1401.

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

In Error to the Supreme Court of the State of Alabama.

MOTION TO ADVANCE.

To the Honorable the Supreme Court of the United States:

The undersigned counsel, respectively for the Nashville, Chattanooga and St. Louis railway and the State of Alabama, respectfully pray your honors to advance on the docket of the Supreme Court of the United States case No. 1401, The Nashville, Chattanooga and St. Louis Railway *vs.* The State of Alabama.

In support of this motion we direct the attention of the Court to the following facts appearing upon the record:

This case is a criminal prosecution by the State of Alabama against the Nashville, Chattanooga and St. Louis railway for employing a citizen of Tennessee as conductor

upon its train who had not been previously examined for color-blindness, as required by a statute of the State of Alabama. The case at bar involves the constitutionality of this statute. The Nashville, Chattanooga and St. Louis railway is an interstate railroad and passes through twenty-four miles of the State of Alabama, employing about three thousand men who are affected by the statute. In addition to this the statute affects all the railroads in the State, and those passing through the State, and the constitutional rights of many thousand citizens of the State of Alabama, and citizens of other States passing through Alabama while in the employ of the railroads. The delay in the decision of this cause will cause many thousand citizens of Alabama and other States to be liable to criminal prosecution, and will entail large expense upon the State of Alabama. The speedy decision of the case will greatly advance the welfare of the State, while delay will be greatly injurious to the State, the railroads, and the people. This motion is made under the provisions of rule 26, sections 3, 6, and 7, and reference is hereby made to the printed record in this cause.

All of which is respectfully submitted.

T. N. McClellan,
Attorney General of Alabama.

Oscar R. Hundley,
Attorney for Nashville, Chattanooga and St. Louis Railway.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1887.

No. 1401.

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

MOTION TO ADVANCE.

To the Honorable the Supreme Court of the United States:

The undersigned counsel, respectively, for the State of Alabama and for the Nashville, Chattanooga and St. Louis Railway, respectfully pray your honors to advance on the docket of the Supreme Court of the United States the case of Nashville, Chattanooga and St. Louis Railway *versus* The State of Alabama, appeal from the supreme court of Alabama.

The case is one of great importance, involving constitutional questions, the speedy solution of which will settle vexed questions in which the State of Alabama and all railroads in this State are deeply interested, and the speedy decision of which will advance the welfare of the State, whilst delay will be greatly injurious to the State, the railroads, and the people.

For these reasons the counsel representing the State of Alabama and the Railroad Company unite in this application, and they unitedly and respectfully pray your honors to grant this request.

Very respectfully submitted,

~~I. N. McCULLOM~~, T. N. McClellan

Attorney General.

OSCAR R. HUNDLEY,

Attorney for Nashville, Chattanooga and St. Louis Railway.

Montgomery, Alabama, March 22, 1888.